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No. 592

IN THE

United States Supreme Court

CARL G. SWANSON, *Petitioner*

v.

THE FLORIDA BAR, *et al, Respondents*

On Petition for Certiorari to the United States
Court of Appeals
Fifth Circuit

BRIEF FOR RESPONDENTS

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October 6, 1967

IN THE

United States Supreme Court

CARL G. SWANSON, *Petitioner*

v.

THE FLORIDA BAR, *et al, Respondents*

BRIEF IN OPPOSITION FOR RESPONDENTS

QUESTION PRESENTED

Did the district court below err in dismissing an attorney's complaint for an injunction preventing The Florida Bar (an official body created by order of the Supreme Court of Florida) from conducting disciplinary proceedings against him for alleged misconduct when the proceedings sought to be enjoined were actually pending and where sustaining the complaint would have required the court to hold invalid on its face the rules of the Supreme Court of Florida for conducting disciplinary proceedings against attorneys?

STATEMENT OF THE CASE

The statement of the case in the petition completely fails to describe the proceedings which culminated in the opinion and judgment of the Court of Appeals.

On December 23, 1964, petitioner, a Florida attorney, filed a motion in the Supreme Court of Florida (R. 44) alleging that a grievance committee of The Florida Bar was about to conduct an investigation of charges that he had paid for the solicitation of professional employment and that he had procured false testimony in Florida court proceedings (R. 48). The motion sought to have the investigation quashed on the ground (among others) that proceedings under the Integration Rule of the Supreme Court of Florida which established The Florida Bar[1] would deprive petitioner his right to practice without due process of law by combining in The Florida Bar "as an agency of the Supreme Court of Florida the functions of prosecutor, judge and jury" (R. 46). The other grounds of the motion raised questions of state law which are not material here.

Petitioner's motion was heard by the Supreme Court of Florida. In responding to the motion, The Bar contended that the Integration Rule was not invalid on its face and that whether proceedings against Petitioner would deny him due process of law could only be determined from the conduct of the proceedings themselves; therefore, the motion was untimely. The Supreme Court of Florida denied the motion as premature.

Petitioner then filed a complaint (R. 1) in the district court below seeking an injunction which would prevent The Florida Bar from continuing to prosecute the griev-

[1]The Florida Bar is a corporate body created by and existing under the authority of the Supreme Court of Florida. All attorneys in Florida are required to be members. The Bar has been charged by the Florida Supreme Court with the maintenance of professional standards in the practice of law. To that end it has been vested as an official arm of the court with the powers and authority described in the Integration Rule of The Florida Bar. See the appendix to petitioner's brief which sets forth the Preamble to the Integration Rule, Sections 1 and 2 of Article II, and all of Article XI of the Integration Rule.

ances against him. The only specific allegation in the complaint (apart from Petitioner's conclusory allegation that the Integration Rule is void on its face) is that one of the members of the grievance committee which had investigated the charges and developed facts prior to the finding by the Board of Governors of probable cause had previously filed charges against the Petitioner.

The Bar filed a motion to dismiss (R. 22) asking the district court to abstain from exercising such jurisdiction as it may have had because the Florida proceedings were actually pending, because Petitioner could raise the constitutional issues just as well in those proceedings, and because if the ultimate decision by the Supreme Court of Florida should be against him, he would be entitled to have the constitutional issues determined through appropriate proceedings in this court. The constitutional question could then be decided in the context of what was actually done by The Florida Bar and the Florida Supreme Court. (R. 22). The district court dismissed Petitioner's complaint (R. 99). Petitioner appealed. The Fifth Circuit Court of Appeals affirmed the dismissal holding that the Integration Rule was not invalid on its face, and consequently, that Petitioner's attack on it was premature.

ARGUMENT

Nothing in the record warrants review by this court of the decision below.

The court below decided only that the Integration Rule was not invalid on its face and that since no facts had been developed in the Florida proceedings from which the application of the rule in Petitioner's case and its effect on him could be evaluated, a decision of the constitutional issue was premature.

The court below was clearly right in refusing to hold the Integration Rule invalid on its face. The mere fact that The Florida Bar, as an agency, prosecutes and adjudicates grievances in the initial stages (subject to review by the Supreme Court of Florida) does not warrant any inference that the individual members of the Board of Governors are biased against him. In fact, the Integration Rule shows on its face the scrupulous care which the Florida Supreme Court has taken to eliminate potential bias by making sure that the functions of prosecution and adjudication are separated in different individuals.

Under the Integration Rule the first step in any disciplinary proceeding is an investigation by a local grievance committee which acts somewhat like a grand jury. Its only function is to investigate allegations of misconduct by members of the Bar and determine whether or not to recommend a finding of probable cause by the Board of Governors. The grievance committee has no power to do more than investigate and recommend.[2] If the grievance committee recommends a finding of probable cause, it prepares a record and a report and files these with the Executive Director of The Florida Bar.[3] No formal complaint may be issued unless the Board of Governors adopts the recommendations and finds that probable cause exists.[4] If the Board does find probable cause, a referee is appointed to conduct a hearing. Although the Board of Governors appoints the referee, the appointment must be from a list of persons approved by the Supreme Court of Florida.[5]

At this stage in the proceedings, the Board of Governors appoints an attorney to prosecute the grievance in the name

[2]Rule 11.04.
[3]Rule 11.04 (5) (b).
[4]Rule 11.05.
[5]Rule 11.05 (4).

of The Florida Bar.[6] The referee conducts a hearing after formal pleadings.[7] The accused attorney has the right to appear as a witness and to have witnesses subpoenaed in his behalf. After the hearing, the referee submits his report to the Board of Governors. The report includes a transcript of the proceedings and the referee's findings of facts and recommendations. Bar counsel and the accused attorney are each entitled to file statements in support of or in opposition to the findings and recommendations of the referee. The record then is referred to a reviewing committee made up of five members of the Board of Governors, which prepares a written report of its recommendations. The report is considered by the Board, but if two members of the reviewing committee disagree as to the guilt of the accused attorney, a quorum of the entire Board of Governors must review the record to insure protection of the accused's rights. Only after this procedure has been followed may the Board of Governors enter a judgment of guilty.[8]

But even then the determination is not final. All judgments of the Board of Governors are subject to review by the Supreme Court of Florida. The scope of its review was described in *In re Harper*, 1956, 84 So.2d 700, where the Supreme Court wrote:

> Disciplinary proceedings by The Florida Bar are essentially a function of this court. While the local committees and the board of governors are not techni-

[6]Rule 11.06 (4) (a). Rule 11.03 (5) precludes Bar Counsel from being a member of the Board of Governors, of a grievance committee, or of the panel of referees. In addition, under Rule 11.03 (7) former members of the Board of Governors and of the grievance committees are precluded for a stated period of time from either representing accused attorneys or acting as referees. Former members of grievance committees are prohibited from representing accused attorneys or the Bar in any proceeding in which they have previously been involved.

[7]Rule 11.06.

[8]Rule 11.06 (9).

> cally judicial tribunals, their findings and recommendations should be considered as those of an intermediate agency of this court. They are in fact an arm of this court dealing with a vital function of the court and under its exclusive jurisdiction . . . While the power to render the ultimate judgment in these cases is vested in this court, the findings and recommendations of the constituted officers of The Bar are entitled to receive due consideration and are of persuasive force.

Petitioner is admittedly entitled to due process of law in the grievance proceedings against him, but the mere fact that the functions of prosecution and initial adjudication are combined in one agency does not deprive petitioner of that right.

We recognize that if members of the Board of Governors had a pecuniary interest in the results of their decision, due process would be denied. By the same token if members of the Board were personally interested in prosecuting Petitioner for some other reason, due process would probably be denied. But whether the individual members of the Board of Governors are biased or bias ought to be inferred depends on the facts of the case, not on the abstract structure of the rules under which the proceeding is conducted. The ultimate question is whether bias exists in Petitioner's case. This cannot be determined until the proceedings against him have been allowed to run their course. The proceedings have not been fully applied to Petitioner. He wants a decision on the constitutionality of the proceedings in the abstract before they have been applied.

This Court has traditionally refused to decide constitutional questions before decision of them is necessary and then only on the precise facts of a particular case.[9]

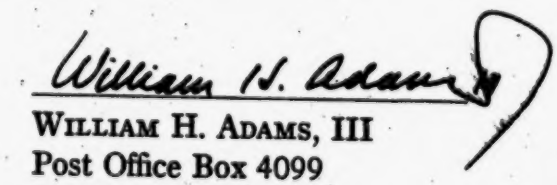
[9]Rescue Army v. Municipal Court, 331 U.S. 549 (1946).

Neither the Supreme Court of Florida nor the courts below have decided the constitutional issues raised in the petition. They have held only that those issues should be decided after the facts have been developed. Petitioner may raise particular objections in the course of the Florida proceedings to any aspect of those proceedings which he considers improper. If The Bar and the Supreme Court of Florida should ultimately rule against his objections, the constitutional issues would be ripe for consideration by this court. Until then, any decision of those issues would be hypothetical.

CONCLUSION

The Integration Rule is not invalid on its face. Petitioner's complaint seeking an injunction was premature. The courts below were right in refusing to decide his case in the abstract. The petition does not specify any reason why this court's supervisory power should be invoked. The petition should, therefore, be denied.

Respectfully submitted,



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